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1 RECORD OF ORAL HEARING
2

3 UNITED STATES PATENT AND TRADEMARK OFFICE
4

5

6 BEFORE THE BOARD OF PATENT APPEALS
7 AND INTERFERENCES
8

9

10 *Ex parte* NORBERT BECKER, GEORG BIEHLER, MATTHIAS DIEZEL,
11 ALBRECHT DONNER, DIETER ECKARDT, HARALD HERBERTH,
12 MANFRED KRAMER, DIRK LANGKAFEL, RALF LEINS, RONALD
13 LANGE, WALTER MOLLER-NEHRING, JURGEN SCHMOLL,
14 KARSTEN SCHNEIDER, ULRICH WELZ, HELMOT WINDL
15

16

17 Appeal 2008-2316
18 Application 09/936,047
19 Technology Center 2100
20

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22 Oral Hearing Held: August 13, 2008
23

24

25 Before JEAN R. HOMERE, ST. JOHN COURtenay III, and STEPHEN
26 C. SIU, *Administrative Patent Judges.*
27

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29 ON BEHALF OF THE APPELLANTS:
30

31 JOHN W. FITZPATRICK, ESQ.
32 Harness Dickey & Pierce, PLC
33 11730 Plaza America Drive
34 Suite 600
35 Reston, Virginia 20190
36

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1 *The above-entitled matter came on for hearing on Wednesday, August*
2 *13, 2008, commencing at 9:36 a.m., at the U.S. Patent and Trademark*
3 *Office, 600 Dulany Street, 9th Floor, Alexandria, Virginia, before Jennifer*
4 *M. O'Connor, Notary Public.*

5

6 THE CLERK: Calendar number 18, Mr. Fitzpatrick.

7 MR. FITZPATRICK: Good morning.

8 JUDGE HOMERE: Good morning, Counselor. You have 20 minutes
9 and feel free to begin whenever you're ready.

10 MR. FITZPATRICK: Thank you. I'd like to begin by saying just by
11 a quick overview of the subject matter of the application, which in this case
12 relates to an automation system that includes a directory or repository of
13 automation objects, and these objects allow for dissimilar engineering
14 systems to be used together. They do this by allowing joint developer
15 access to the directory so that parallel users can work on the objects for
16 different tasks, and thereby create the automation solutions in parallel.

17 In contrast to the subject matter of the application, the primary
18 reference of Weinberg relates to a software program called Astro® Site
19 Manager. This software program --

20 JUDGE HOMERE: Counselor, just a minute.

21 MR. FITZPATRICK: Sure.

22 JUDGE HOMERE: Before we delve into the prior art, can you
23 reconcile the claimed invention with the invention as you just explained, as
24 you just laid it out for us here a moment ago?

25 MR. FITZPATRICK: What do you mean reconcile?

1 JUDGE HOMERE: Can you explain to us how the claimed invention
2 accomplishes what you set forth?

3 MR. FITZPATRICK: Certainly. The directory, which is -- has access
4 to a plurality of users, so it's more of a repository or database. There are the
5 automation objects or modules that are available for any of the developers to
6 access that module.

7 JUDGE HOMERE: Are you reading from the text of the claim or are
8 you just --

9 MR. FITZPATRICK: No. Do you want me to read from the text?

10 JUDGE HOMERE: Of course, yes.

11 MR. FITZPATRICK: Okay. And reconcile the claim language with
12 what, Your Honor?

13 JUDGE HOMERE: With -- just give us a summary of what the
14 invention is supposed to be doing.

15 MR. FITZPATRICK: Certainly. Certainly. The automation system
16 which I just described -- as I described, creates automation solution out of
17 the claim language. There is a plurality of automation objects, as I discussed,
18 that are to be created and worked on, and the automation objects realize --

19 JUDGE HOMERE: So they're not created yet? So we start off with
20 what exactly?

21 MR. FITZPATRICK: There would be an existing module in an
22 existing form that may be used.

23 JUDGE HOMERE: What is a module?

24 MR. FITZPATRICK: What is a module?

25 JUDGE HOMERE: Yes.

1 MR. FITZPATRICK: Code.

2 JUDGE HOMERE: Okay, so you start with code and then you're
3 about to create objects?

4 MR. FITZPATRICK: It's application code, right. Right, as in
5 hierachal programming, there are a number of modules.

6 JUDGE COURtenay: Are these automation objects really
7 positively recited in your claim, because you claim a plurality of automation
8 objects which are to be created. This is something that happens in the
9 future.

10 JUDGE HOMERE: Of course.

11 JUDGE COURtenay: Is that really a positive recitation of
12 automation objects; how are we to construe that claim language, something
13 that happens in the future?

14 MR. FITZPATRICK: The intent of the claim is that, as I began to
15 explain, that the objects in some form exist. They are going to be
16 manipulated or worked on to create a variation for a new or different module
17 or object that can be used with a specific application.

18 JUDGE COURtenay: But you said they exist, but your claim
19 recites a plurality of automation objects which are to be created. They don't
20 exist until they're created and your claim recites that they're to be created --
21 to be created in the future.

22 MR. FITZPATRICK: That's a very good point. It's not exactly a
23 positive recitation, I admit.

1 JUDGE COURTENAY: So should we give that claim element
2 weight, palpable weight, automation objects that are to be created in the
3 future?

4 MR. FITZPATRICK: I think that's an excellent point and it would
5 have been a very good point for the examiner to have brought out three or
6 four or five years ago if that was an issue. We have proceeded on the
7 grounds that it was a valid claim since there was no objection to the
8 language at any time during prosecution as not being positively recited. So I
9 take your point.

10 JUDGE COURTENAY: It gets de novo review to the examiner's
11 prosecution history.

12 MR. FITZPATRICK: Of course. In that event, would you like me to
13 continue?

14 JUDGE COURTENAY: Yes. Please do.

15 MR. FITZPATRICK: The directory in this case includes the
16 automation objects. Those objects are available for access by a number of
17 developers who are trying to interface an existing engineering system with
18 another application so that they can interface or speak or work together.
19 That's the point of the automation object. I'm trying to go through the claim
20 here, as you asked.

1 JUDGE HOMERE: The problem I'm facing here right now is that
2 while this exchange here is not about the claims, it's about what the claims
3 are supposed to be, and I don't know how we can give a meaningful review
4 based on what's not before us. I mean, we can only review what's before us
5 and what's before us, we have objects that are to be created and in your
6 mind, you are thinking about objects that are -- you're talking about existing
7 objects and I'm at a loss to see how we're going to proceed from here.

8 JUDGE COURtenay: How can the examiner come up with a
9 rejection if he has a reference of automation objects and you say in your
10 reply brief on page three that while these objects of the reference have
11 already been created, how can the examiner proffer evidence to reject your
12 claim? Does he show a blank sheet of paper and say that these are objects to
13 be created -- situation here. That's why we have difficulty with when you
14 have a recitation in your claim language of something that happens in the
15 future, something -- an automation object that is to be created.

16 MR. FITZPATRICK: Right, and the claim --

17 JUDGE COURtenay: We're trying to reconcile this here.

18 MR. FITZPATRICK: Right, the claim more properly should have
19 said to be altered or to be worked on as opposed to simply created, may have
20 been clearer in the recitation of the claim. In this case, the claim says to be
21 created and worked on, and I believe what we're probably facing here is
22 somewhat of a translation issue in the claim as it came from the original
23 foreign application. Clearly, it's worked on or going to be worked on or
24 intended to be worked on. It exists, so it's an unfortunate choice here to say
25 to be created.

1 JUDGE COURTENAY: Yes, but it cannot exist until it's actually
2 created; would you agree with that statement?

3 MR. FITZPATRICK: Certainly. Absolutely. So we would be happy
4 to amend the claim language if that's the decision of the panel; we would be
5 happy to do that to more specifically and more positively recite the intended
6 invention.

7 JUDGE HOMERE: But pretty much, I guess the bottom line here is
8 that you are admitting that this claim -- these claims do not capture the
9 essence of the invention, therefore --

10 MR. FITZPATRICK: No, I don't think I'm admitting that. I think I
11 may not be disagreeing with Judge Courtenay that there could have been a
12 clearer recitation and that the idea to be created may give some ambiguity or
13 some indefiniteness to the claim.

14 JUDGE HOMERE: But the question is, is it -- do you agree that these
15 claims as base claim do not capture the essence of the invention?

16 MR. FITZPATRICK: No.

17 JUDGE HOMERE: As they are?

18 MR. FITZPATRICK: No, I don't. I don't agree with that statement,
19 no. I think the claims --

20 JUDGE HOMERE: So, is the invention that while you have a blank
21 sheet of paper and you are about to create objects?

22 MR. FITZPATRICK: I'm sorry, say that again.

23 JUDGE HOMERE: Is the invention that you have a blank sheet of
24 paper; you are about to create objects that you're going to use to work on?

1 MR. FITZPATRICK: No. No, as I think I've explained or attempted
2 to explain --

3 JUDGE HOMERE: Therefore, that's what the claim recites, right?

4 MR. FITZPATRICK: I'm sorry?

5 JUDGE HOMERE: That's what the claim -- that's what the claim
6 recites, right?

7 MR. FITZPATRICK: I think the claim could be interpreted, because
8 of the word "to be created" is somewhat confusing. But I think also that the
9 term --

10 JUDGE HOMERE: Is there another way of interpreting to be
11 created?

12 MR. FITZPATRICK: I think also that the term "worked on," the
13 automation object is worked on means in some sense or is intended to mean
14 some sense that the claim does exist or the object exists.

15 JUDGE HOMERE: No, but a reasonable interpretation of this
16 language would be what -- you're going to create objects and once they're
17 created then you will work on them to be created and worked on. So you
18 created them, then you work on them. So you can't really work on them
19 until they actually -- you actually create it.

20 MR. FITZPATRICK: I think that that interpretation is somewhat at
21 odds with the device here. What is going on is, I attempted to explain, is
22 that there is a directory or a repository that is accessible by a plurality of
23 users. They must be accessing something. They're not accessing blank --
24 you know, a blank piece of paper, if you will.

1 JUDGE HOMERE: I understand that. We can only go with what's
2 before us. I mean, what's before us right now --

3 MR. FITZPATRICK: I understand what you're saying, but you're
4 asking me if I agree with your statement that I -- that this claim does not
5 capture. What I'm saying is that by having the directory and having the
6 directly accessible, that there must be something in there for them to access
7 and work on.

8 JUDGE HOMERE: When is that there? Because we don't have any
9 objects. We have objects that are going to be created. We have a directory.
10 I'd like to know what's in that directory, because we don't have any objects
11 in there yet.

12 MR. FITZPATRICK: And again, I would disagree with that, the
13 interpretation. By the word "worked on," in addition to the word "created,"
14 again I think the --

15 JUDGE HOMERE: No, but it says to be created.

16 MR. FITZPATRICK: If you would not like me to try to address your
17 question, I'm happy to, but if you would like me to try to respond to your
18 question, Your Honor, I would be happy to do that as well.

19 JUDGE HOMERE: Okay.

1 MR. FITZPATRICK: So as I am trying to explain, that the choice of
2 the word "created" is unfortunate, and I'm not saying that it does not create
3 indefiniteness; clearly it does. But there is also the idea that there is
4 additional structure here. That structure is holding something. People are
5 accessing that structure or directory for a reason. If there is nothing there,
6 there would be no -- there would be nothing to access this. It would be
7 pointless.

8 So if the claim is read in light of the specification, I think we
9 understand that there are objects that are being accessed and worked on.
10 That has been the argument that's been, I would think, very clearly proffered
11 throughout prosecution. So I'm not disagreeing with your statement that
12 there is some indefiniteness to the wording in that phrase. However, I don't
13 think it just renders the claim completely useless or does not capture the
14 invention.

15 JUDGE HOMERE: Well, let me ask you a question. Do you have a
16 copy of the reply brief?

17 MR. FITZPATRICK: Hmm-hmm.

18 JUDGE HOMERE: Yes? At page three, away -- the panel has tried
19 to distinguish the claimed invention over the prior art of record. It says that
20 while the claim -- the claimed invention calls for objects to be created,
21 whereas the prior art calls -- teaches existing objects.

1 MR. FITZPATRICK: I think it says created and worked on. I believe
2 that we're discussing again the claim language. The intent there, the point
3 that was trying to be made was that in the Astro® program, there are a
4 number of, in this case, OLE objects that allow for communication or
5 interface of the Astro® program with another software package. In this
6 case, it allows for the mapping of the website.

7 It is those objects that are not altered or worked on. They exist.
8 That's the software package that's purchased. What they do is map the
9 website and the website may be worked on, but that was the point of that
10 discussion and trying to distinguish the difference there. In that -- in the
11 claim, the objects in the directory are accessible for alteration or to be
12 worked on, more code rewritten, code changed. Whereas in the Astro®
13 program, use of that program does not necessitate access to the object of
14 Astro®. That doesn't happen.

15 That object is not worked on, rather the website is worked on. That
16 was the point of that -- that passage in the reply brief. And again, I take your
17 point, I agree, due to that phrase, that term, it does add some indefiniteness
18 and some confusion to the claim.

19 JUDGE COURTENAY: Just looking at the term "automation objects
20 in isolation" as you claimed, do you have a definition in your specification
21 that explains or defines what that means?

22 MR. FITZPATRICK: I believe when the specification is read in light
23 of the figures and read in its entirety, that it does add a definition or provide
24 a definition to automation object.

1 JUDGE COURTENAY: Can you point us to the portion of the
2 specification? If I was an artisan at the time of invention and I'm looking to
3 your specification, I want to know how to make and use an automation
4 object.

5 MR. FITZPATRICK: Right, and I think one of the points we made in
6 our reply brief is that the term is well known in the art. You can look up
7 automation object in a Microsoft dictionary. You can look at --

8 JUDGE COURTENAY: So you're arguing the plain meaning of the
9 term?

10 MR. FITZPATRICK: As used in --

11 JUDGE COURTENAY: And what is that plain meaning to you?

12 MR. FITZPATRICK: I think we provided an object that is exposed to
13 other applications or programming tools that supports object linking and
14 embedding, was a plain -- or a use of the term in the art is how the term --

15 JUDGE COURTENAY: Isn't there an object linking and embedding
16 automation object pointed to by the examiner in the reference?

17 MR. FITZPATRICK: The examiner, at least in the remarks section,
18 interpreted automation and object according to *Merriam-Webster's
19 Dictionary*.

20 JUDGE HOMERE: Yeah, but there's a section in the reference that
21 specifically indicates that the nodes are automation object, the OLE
22 automation object, and I think no matter if we don't recognize, they're
23 acknowledge in the reply brief.

1 MR. FITZPATRICK: I agree and that's somewhat one of the
2 inconsistencies in the office action in that the examiner on one hand
3 interprets the OLE objects as automation objects and on the second hand,
4 interprets web pages and website pages as automation objects.

5 JUDGE HOMERE: Yeah, but notwithstanding -- but not
6 notwithstanding what the examiner's interpretation, the reference --

7 JUDGE COURTENAY: I'm looking at column -- excuse me, I'm
8 looking at column 19, line three, and it expressly recites OLE automation
9 objects in the reference, in the *Weinberg* reference.

10 MR. FITZPATRICK: I think that's the exact definition that I just
11 gave.

12 JUDGE COURTENAY: Doesn't that comport with your definition?

13 MR. FITZPATRICK: Yes, it does.

14 JUDGE COURTENAY: As to the plain meaning?

15 JUDGE HOMERE: Yeah, I mean from what I recall, I don't think
16 that's an issue here at all. I mean, the essential issue, from what I saw, was
17 the appellant was trying to distinguish the objects that are to be created and
18 worked on versus existing objects of *Weinberg*, right?

19 MR. FITZPATRICK: And I think that's exactly the point. As you
20 point out, the OLE objects of *Weinberg*, the Astro® Site Manager objects,
21 are not worked on. They're not -- they're not altered. They're -- they are
22 definite in their application and what they do.

23 JUDGE COURTENAY: What do you mean by worked on? If
24 someone references an object or the program calls an object, is that working
25 on an object?

1 MR. FITZPATRICK: According to the -- what we have here in our
2 invention, what the intent is, is that these -- again, these objects are stored in
3 a directory for access by different people, so they can change the object or
4 manipulate the object to work with different, in this case, engineering
5 systems, or software that runs the engineering systems.

6 What we have here in Astro® is simply basically plug-ins that allow
7 the Astro® program to execute to map the website. So nobody is doing any
8 work on those -- those objects as they exist. That's not what they're for. It's
9 merely executable code.

10 JUDGE HOMERE: Well all of that -- I mean, all of that's not -- I
11 mean, that's not really before us, but while we're talking about *Weinberg*,
12 there's a point in *Weinberg* that says that you have all these nodes that are
13 created in the site map, right, and then a user can update any of the nodes.
14 Now wouldn't out bidding -- I mean, given that each node is an object,
15 automation object, wouldn't out bidding a particular object cause one to
16 work on that object?

17 MR. FITZPATRICK: I don't think that the nodes of the site map are
18 automation objects, again consistent with the intended definition.

19 JUDGE HOMERE: Oh, --

20 MR. FITZPATRICK: What the -- what the node objects represent
21 simply are URLs of the website or specific web pages. So we believe that's
22 content, that's website content that is being changed or altered. You can fix a
23 link that's broken, something of that sort, but it does not represent an
24 automation object in the terms that are considered in the application, as
25 they're intended to be defined. They simply represent a URL, an address.

1 JUDGE HOMERE: No, but when you go to -- when you turn to
2 column 19, where *Weinberg*, explicitly referring to Figure 8 and talking
3 about different types of classes of OLE objects and see there are other nodes,
4 that's within the said graph, right?

5 MR. FITZPATRICK: Right.

6 JUDGE HOMERE: Each of the nodes represents URL within a
7 particular site?

8 MR. FITZPATRICK: Well, I think we -- I think we're getting a little
9 bit confused in what's what. Figure 8 is a graphical model. It's an object
10 model of -- only of what those -- what the objects are. When those objects
11 are executed in the software, that level that you're looking at, node, as
12 described clearly in *Weinberg*, represents the URL. The next one over from
13 that represents the attributes. I don't recall the name of it specifically, the
14 node that represents the attributes color and so on of the webpage.

15 So again, it's representative of content. It is not of itself the node, or
16 the object itself is not being manipulated or worked on. It's simply what's
17 represented by that, and that what's represented is the web page, the URL of
18 the web page, and that's being worked on. Do you see my distinction?

19 JUDGE HOMERE: Yeah, so are you saying that each of the nodes in
20 there on Figure 8 is not a -- is not representative of the URL? Because when
21 Astro® scans a web page, it displays that site map, right? It has a plurality
22 of nodes on there, right? Okay. And each of the nodes -- the way I
23 understand, each of the nodes would be depicted as seen, as displayed in
24 Figure 8.

1 MR. FITZPATRICK: The nodes are displayed as in Figure 3. Figure
2 8 is merely a model of the nodes, is I believe how *Weinberg* describes it. It's
3 actually displayed. If you can view Figure 3, that's how it is displayed, as
4 sort of a solar chart, a parent chart.

5 JUDGE HOMERE: Yeah, Figure 3 gives you a tree diagram of that --
6 of the scanning after the program scans the website, would give you -- but
7 isn't Figure 8 another representation of Figure 3, another way to depict
8 what's going on in Figure 3?

9 MR. FITZPATRICK: Not according to *Weinberg*. Not according to
10 my reading of *Weinberg*, at least. I think the description of Figure 8 simply
11 says it is a model of the -- I can't recall exactly the model of the node.

12 JUDGE HOMERE: Yes, it's an object model used by Astro® API.

13 MR. FITZPATRICK: Right, so I think it's another way just for the
14 reader of the patent application to view what's -- what is in the application.

15 JUDGE HOMERE: And when you read -- when you read that, it
16 says, each side graph within that object corresponds generally to a map of a
17 website and includes information about URL and links, including links for
18 the -- links not displayed in the video web display view of the website.

19 MR. FITZPATRICK: All of which is content of the website. The
20 URLs and the links are content and not -- not automation objects. And if we
21 want to continue from there, if we want to look at that, if we can go to the
22 directory, as the examiner sets out, is the directory for entering and storing
23 object names. And the examiner specifically points out, again if we're
24 looking at Figure 3, the zone or up arrow and Mercury Interactive products
25 as being object names.

1 We've already described or alleged that the website is represented by
2 automation objects, which I think you're pointing out is the graphical -- the
3 graphical node there in eight. But again, if we read further in *Weinberg*,
4 what is shown in Figure 3, as pointed out by the examiner, are actually just
5 again, representations of the URLs. And in fact, to call them object names
6 is, I think, maybe stretching it a little bit, especially Mercury Interactive
7 product, which is the name of the manufacturer.

8 JUDGE HOMERE: I think for my -- from our review of the
9 *Weinberg* reference, I think there's a direct correlation between Figure 8 and
10 Figure 3, and it's in that -- you have not established -- I mean, you want to
11 separate out the teaching of Figure 8 from that of Figure 3. If you focus on
12 column 19, you will see that Figure 8 is another way of representing what's
13 going on with the nodes in that site map, because you can reference each of
14 the nodes or the URLs as objects, as automation objects.

15 And then further, *Weinberg* does teach that you can click on a
16 particular node, a particular object, in order to update the information on
17 there. And that should be -- one of ordinary skill in the art would readily
18 understand that clicking on a particular node to update it, that's working on
19 an existing object. So even -- I mean, assuming arguendo that the claim had
20 recited what -- probably captured the essence of the invention, I would -- it
21 seems to me that *Weinberg* would still teach the invention under disclosure
22 of Figure 8.

1 MR. FITZPATRICK: I would -- I would suggest that Figure 8 is --
2 again, is a representation of the object model and Figure 3 is a representation
3 of the mapped website using the object model. So is there a correlation?
4 Yes. Are they the same thing? I don't think so.

5 As I said, I think what's represented there are simply web pages which
6 are content, or at least addresses to content, and updating the URL I don't
7 believe corresponds to working on the node or the object, automation object
8 itself. I think you need the node, or what's called the node -- that object is
9 called the node -- to access and to do the work to the website.

10 But I think that's the distinction. You're working on the website;
11 you're not working on the Astro® object model per se. And I think that's
12 the -- albeit it may be subtle, I think that is the distinction.

13 JUDGE HOMERE: Do you have anything else?

14 MR. FITZPATRICK: I think our time is probably up. One other
15 point briefly, if you don't mind. In the directory entry section of the claim,
16 where we described that the directory entries are assigned object names and
17 there's three specific types of data that are assigned, one of the things I think
18 that also helps in this conversation that we're having is the second
19 information data which is described as description of the technical --
20 technological functionality representative of the object.

21 Again, if we're calling the object the URL, again, if that's the
22 definition we're going to give to it, I don't see where there's a technological -
23 - a description of technological functionality. Again, when I read a URL, I
24 get nothing out of what it does as far as its technical function. It just is pot
25 of numbers and so on to point me to an address.

1 So I think that again lends somewhat to the distinction between what
2 is an object, what is an automation object, and what is a URL, is we're trying
3 to, at least in this case, say is an automation object.

4 JUDGE HOMERE: So you're saying that *Weinberg* is not directed to
5 an automation technology; is it what the argument is?

6 MR. FITZPATRICK: The argument is that *Weinberg* does not
7 disclose the automation system having the automation -- the plurality of
8 automation objects in the directory, as in the claim.

9 JUDGE HOMERE: I know what the examiner is saying from my
10 reading of the record, is that the solution that you're trying to bring about is,
11 you have a website and then you're trying to create a map of that website, so
12 you use the Astro® program to scan that website in order to generate, to
13 locate the URLs in there.

14 So the solution itself would be scanning the website and then
15 generating the map. Therefore, each URL or each node in there would be --
16 would constitute an object realizing a partial automation.

17 MR. FITZPATRICK: I think that --

18 JUDGE HOMERE: Automation solution.

19 MR. FITZPATRICK: I think that is the examiner's argument, exactly.
20 I think you've paraphrased it very well. But I think one of the things I was
21 trying to point out with that section is that to try to further distinguish what
22 we are saying between the URL and what we intend to be an automation
23 object, because I say there is this distinction between the two, I believe the
24 URL is content and it's the content that's being manipulated, i.e. the address
25 of the node, which is different from the automation object of Astro®.

1 And I think what I was trying to point out is that there's a further
2 supporting argument here in that we specifically say that there are object
3 names which represent our automation object, are given these three
4 descriptive types of data information that is in the claim and specifically a
5 description. One of the names that's given is this descriptive functionality.
6 Information is included in the directory with that object so that a user
7 accessing the directory says oh, that's the object I'm looking for. It performs
8 this task. We don't -- if you look at the node, if we're going to interpret the
9 node as the URL, as the automation object, well there is no such kind of
10 description.

11 JUDGE HOMERE: But the examiner pointed -- the examiner pointed
12 to the fact that each URL, each node, has a name and on top of that, if you
13 put the mouse on the URL, you get information pertaining to what -- you
14 know, you have summary information pertaining to what that URL is or to
15 what the website corresponding to the URL is.

16 MR. FITZPATRICK: Does *Weinberg* disclose that?

17 JUDGE HOMERE: That's -- sure. I mean, that's in --

18 MR. FITZPATRICK: I don't see that. I know there is a link, that you
19 can click on a link and get more information, which is obviously different
20 than the node itself. That link is represented by the arrows in Figure 3,
21 which is different than the node itself.

1 JUDGE HOMERE: Yeah, Figure 3. On Figure 3, you have -- if
2 you're looking at Figure 3, you have the nodes, different nodes. You have a
3 name for the node. You have the actual URL, the actual address of the
4 URL, and the examiner had -- when you look at the root node, you have the
5 Mercury Interactive product.

6 MR. FITZPATRICK: Which we don't believe is the node. I mean,
7 that's the name of the manufacturer of the software . I don't believe we can
8 really consider that a node if they're going to call a node an automation
9 object.

10 JUDGE HOMERE: It's root node.

11 MR. FITZPATRICK: Well, it may be a root node, but it's --

12 JUDGE HOMERE: And if the root node -- around it.

13 MR. FITZPATRICK: I don't dispute that. But under the
14 interpretation, you can't call it then an automation object because it's simply
15 the name of the manufacturer of the software.

16 JUDGE HOMERE: And by the time you get to Figure 4, it gives you
17 an annotation for each node and gives you a status protocol, content, size;
18 that's a lot of information.

19 MR. FITZPATRICK: In Figure 4?

20 JUDGE HOMERE: Figure 4.

21 MR. FITZPATRICK: And that is -- Figure 4 is another --

22 JUDGE HOMERE: It's a good explanation of Figure 3.

1 MR. FITZPATRICK: So this, what we're looking at here, where
2 we're talking about the -- represents the node of the website, the http, bbop
3 680 (ph), that information, yeah, I see there's further information. Would I
4 call that a description of the technological functionality? No, I would
5 consider that other code and other information. I mean, they're clearly just
6 more websites.

7 They're additional URLs, are they not? Http, colon, back slashes,
8 another -- they're access to a balloon picture, a clock picture, financial 10k
9 picture. I don't know if they just meet technological description of the
10 functionality. But if that's the interpretation that you give it, that's fine.

11 My point in that was only to try to further distinguish that there are
12 differences between the automation object and the URLs of the website,
13 again representing content as opposed to the code that's used to interface
14 between two systems.

15 JUDGE COURtenay: So your position is this second information
16 data as a description of technological functionality is not taught or suggested
17 by any of the references of record?

18 MR. FITZPATRICK: That's right, not because it's being -- it's in the
19 directory as it's claimed. It's in the directory and it's given that information
20 as part of the name for the automation object.

21 JUDGE HOMERE: I just want to note that this an argument that was
22 not presented in any of the briefs, not in the appeal brief nor in the reply
23 brief and of course, we are going on a hypothetical here, because I think that
24 the overarching thing here is the fact that we have claims that, as you
25 pointed out, are indefinite.

1 MR. FITZPATRICK: I'm sorry, you point out it's indefinite, and I
2 said may lend some indefiniteness to the claim.

3 JUDGE HOMERE: Okay, yeah.

4 MR. FITZPATRICK: Just one more thing. You say there's
5 arguments that weren't pointed out to you?

6 JUDGE HOMERE: No, but technology -- you said that prior art, this
7 *Weinberg* reference, doesn't teach automation technology, is not directed to
8 automation technology, and I don't recall seeing that argument in the briefs.

9 MR. FITZPATRICK: Okay, I just want to be clear which we were
10 discussing, that's all. Okay, I have nothing else.

11 JUDGE HOMERE: Okay, great.

12 JUDGE COURtenay: Thank you very much.

13 JUDGE HOMERE: Thank you very much.

14 MR. FITZPATRICK: Thank you. I appreciate your time.

15 JUDGE HOMERE: No problem.

16 (Whereupon, at 10:10 a.m., the proceedings were concluded.)

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